How to read a case: Ethnographic lawyering, conspiracy, and the origins of Al Qaeda

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Abstract
This article delineates a particular orientation to combining professional legal training and anthropological scholarship that I call ethnographic lawyering. Ethnographic lawyering takes legal form as an object of anthropological analysis, loosely inspired by the Marxist jurist Evgeny Pashukanis’s theorization of law as a social relation. If ethnographic method in anthropology entails theorizing from the concepts and experiences of interlocutors, then ethnographic lawyering analytically centers the subjectivities, logics, and relationalities that legal form both presupposes and animates. Ethnographic lawyering brings to light the contingent lives of legal form. To demonstrate this method, the article uses the example of conspiracy in early US court cases involving Al Qaeda, informed by the author’s experiences as an attorney and anthropologist in litigation arising from the war on terror. An ethnographic lawyering approach illuminates how conspiracy’s distinct forms in criminal law, the law of evidence, and tort law each bring far-flung subjects, events, and actions together into reified entities even as they atomize and recombine social relations. This dynamic tension resembles the vertiginous nature of conspiracy theorizing in general.

Keywords
ethnographic lawyering, anthropology of law, conspiracy, Al Qaeda, war on terror

Resumen
Este artículo delinea una orientación particular para combinar el entrenamiento legal profesional y la investigación antropológica que llamo la abogacía etnográfica. La abogacía etnográfica toma la forma legal como un objeto de análisis antropológico, aproximadamente inspirada por la teorización de la ley como una relación social del jurista marxista Evgeny Pashukanis. Si el método etnográfico en la antropología conlleva a teorizar desde los conceptos y experiencias de los interlocutores, la abogacía etnográfica centra analíticamente las subjetividades, las lógicas y las relationalidades que la forma legal tanto presupone como anima. Para demostrar este método, el artículo utiliza el ejemplo de la conspiración en casos tempranos de la corte estadounidense envolviendo a Al Qaeda, informado por las experiencias del autor como un abogado y antropólogo en litigación derivada de la guerra contra el terrorismo. Una aproximación de la abogacía etnográfica ilumina cómo las formas distintas de la
This article delineates an orientation combining professional legal training and anthropological scholarship that I call ethnographic lawyering. Like anthropological reasoning in general, ethnographic lawyering theorizes from empirical observation of the social world with a focus on the everyday concepts and intuitions of research interlocutors. But one can describe it as lawyering in the sense that the aspect of the social world from which this theorization stems is legal form, whose mastery is part of the craft of lawyers and other legal specialists. This article goes on to demonstrate some methods of ethnographic lawyering by reference to legal forms of conspiracy in US law in court cases related to the entity known as Al Qaeda.1

Ethnographic lawyering harnesses some of the sensibilities of lawyering practice for anthropological scholarship. While professional legal training is hardly a prerequisite for the anthropological study of law, ethnographic lawyering makes use of one thing provided by such training that is difficult to obtain otherwise: immersion in worlds of legal form and their common sense, or what is glossed in law schools as “thinking like a lawyer” (Mertz, 2007). Ethnographic lawyering is neither wholly new nor entirely distinct from prevailing approaches, but as an orientation it can be conceptually disentangled from the anthropology of law, on the one hand, and from legal scholarship, on the other.

The anthropology of law has in recent decades taken up law as a category of study in the broadest possible sense, including lay people’s encounters with law and the experiences of those who work in legal institutions, and for good reason: as with culture, law is one of those categories whose value for anthropologists has resided in its capaciousness rather than its conceptual specificity. In comparison, the object of ethnographic lawyering, legal form, is narrower. This article is loosely inspired by Marxist jurist Evgeny Pashukanis’s ([1927] 2003) theorization of legal form: legal form includes rules, but it also encompasses the universe of subjects those rules necessarily presuppose, the relations between those subjects, the logics underlying those relations, and the doctrines animated by all these forms over time. Attention to legal form enables a more dynamic and engaged anthropological reading practice of legal texts, instead of treating them as discursive objects that merely express or reproduce ruling ideologies. Thinking ethnographically with legal form thus confounds the distinction between “law on the books” and “law in action” that, despite ample critique, continues to backstop much of the contemporary anthropology of law. Over two decades ago, Annelise Riles (2000, 100) aptly noted that “legal anthropologists have always had a greater interest in ‘law in action’ (in institutions, in informal and non-Western dispute resolution processes) than in ‘law on the books.’” The observation remains true today (Das Acevedo, 2023). Aligned with turns in more recent scholarship on language and law (Constable, 2014) and linguistic anthropology of law (Bernstein, 2022), ethnographic lawyering treats the law on the books—inf sof as this represents the category to which legal forms are relegated—as a key site of law in action.

And from the other side, ethnographic lawyering is distinct from legal scholarship in the sense of most research produced in law schools. While ethnographic methods are sometimes employed in legal scholarship to great effect (Bridges, 2011; Dubal, 2017), ethnographic lawyering represents the converse: legal form provides the entry to a method of anthropological reasoning. The result can be a sort of agnosia for legal scholars, insofar as their work of theorization often presupposes legal form as part of its common sense in the first place. Such “problems of incommensurability” (Kahn, 2022) were reinforced for me when presenting a version of this article to law professors, who found the conclusions about conspiracy law uncontrovertial, if not banal (which was reassuring, insofar as my descriptions resonated with their professional common sense). Their well-intentioned suggestions for restructuring the article, geared toward publication in a law review, however, would have made the arguments entirely trivial for anthropological scholarship—all of which is a reminder that perhaps complementarity rather than synthesis may be the most productive relationship between the two domains.

To demonstrate one instance of ethnographic lawyering, this article turns to an elementary example: conspiracy as a doctrinal object in US federal courts, focusing on terrorism cases arising in the war on terror and how they have construed the entity known as Al Qaeda (in this article, “terrorism” refers only to the variety of offenses denominated as such under US law and is not called upon here as a conceptual or political category). To be sure, the state quite literally engages in its own form of conspiracy theorizing through the apparatus of law in its questionable reification of entities deemed threatening. Yet rather than merely turning the state’s own categories against it, the observation that the law incites its own manner of conspiracy theorizing is here an entry point into an otherwise occluded domain of ethnographic investigation.

Conspiracy theorization in general fertilizes fields of contestation riven with their own internal disputes as much as it creates singular counternarratives to the prevailing order. The same is no less true of conspiracy’s legal forms. For conspiracy is not merely a concept that can be distilled from authoritative sources, such as precedential court decisions or treatises, as typical “law on the books” formulations would have it. Instead of theorizing conspiracy as such and thus giving it a misleading (or at least not particularly illuminating) coherence, the approach here explores it as a clunky assemblage of doctrinal objects, each a distinctive condensation of legal form. Attention to legal form allows tracing how the term conspiracy is applied to doctrinal objects deployed in diverse contexts, arraying different legal subjects in relation to each other and reshaping conditions for
disputation in the process. This proliferation, ramification, and metastasis of legal forms in tension with one another demonstrates the contingency and multiplicity of legal forms in general, a social world embedded in other social worlds that ethnographic lawyering takes as its object of analysis.

In this article, I forego reliance on traditional participant observation and instead trace the emergence, migration, and transformation of ethnographic objects by analyzing court records and other official documents. While ethnographic lawyering is readily compatible with participant observation, the choice to stick to the papers here is intended to clarify the proof of concept for this approach and highlight the specific attentiveness to reading practices it entails. This reading of cases with both anthropological and lawyerly sensibilities in mind is informed by my experiences in the national security law context, including criminal cases, administrative proceedings, and the paradoxes of both that continue to unfold at the US military detention facility at Guantánamo Bay, Cuba. I have worked as a litigator, as an expert witness in the guise of an anthropologist researching contemporary jihad formations, and as a consultant for defense teams, drawing on my dual competency to help litigators strategize about how best to deploy expertise in their practice. Finally, and not least, my thinking around ethnographic lawyering has been sharpened by the awkwardness of translation, of having to explain anthropological thinking to lawyers and law professors and to explain legal doctrine and legal scholarship to anthropologists (Mertz, Ford, and Matoesian, 2016).

ETHNOGRAPHIC LAWYERING: ORIENTATION AND METHODS

Ethnographic lawyering is anthropological theorizing from the experiential world of legal form, with its doctrinally embedded categories, subjects, objects, relationships, and logics. This is an orientation that involves different methods, with this article focusing on reading practices attuned to the vicissitudes of legal form. Anthropologists are, of course, no strangers to reading law, but they tend to do so in a way that consigns what is read to the edges of the ethnographic stage, as something that either shapes or is shaped by “the social.” Ethnographic lawyering instead starts from legal form and refuses its hasty sequestration. Pertinent recent examples would include Anneline Riles’s (2011) use of collateral as a doctrinal object to theorize legal reasoning in global financial markets; Justin Richland’s (2013) work on jurisdiction, which takes up this important doctrinal category in sociolinguistic terms, as the ability to speak legal authority; Jeffrey Kahn’s (2019) demonstration of how litigants decontextualize and recontextualize legal precedents to create persuasive appeals to authority; Brinkley Messick’s (2018) attention to textual forms and writing practices in Islamic law; Hannah Appel’s (2019) analysis of contracting and subcontracting forms in petrocapitalism; and Gavin Sullivan’s (2020) study of terrorism lists as surveillance assemblages that enable new forms of knowledge.

While these studies are instances of both ethnographic lawyering and anthropologies of law, the two categories are not coextensive. And just as not all anthropology of law is ethnographic lawyering, not all ethnographic lawyering is necessarily anthropology of law. In my own work, the simplest varieties of ethnographic lawyering have entailed taking theorists’ (mis)readings of juridical concepts such as sovereignty and habeas corpus as points of departure for exploring concepts such as empire (Li, 2018) and captivity (Li, 2022). In my fieldwork with accused “jihadists,” attention to different forms of attorney-client relationality has provided models for navigating certain ethical considerations around disclosure (Li, 2020, 18–22). In none of these examples was law the primary object of study: instead, legal form informed anthropological thinking about the world beyond law. In this way, ethnographic lawyering can be regarded as anthropology from law rather than anthropology of law.

Ethnographic attention to legal form is helpful for transcending a narrow notion of law as written rules without dissolving the object of inquiry such that formal law simply becomes a cipher for whatever concept happens to be fashionable in any given season. The method here is broadly inspired by the approach of Evgeny Pashukanis (1891–1937), arguably the most important legal theorist of the early Soviet Union, and who has thus far received scant attention from Anglophone anthropology (cf. Collier, Maurer, and Suárez-Navaz, 1996). Pashukanis sought to develop a specifically Marxist legal theory, opposing both doctrinal formalists and some Marxist approaches that reduce law to an epiphenomenon of modes of production (Pashukanis, [1927] 2003, 55). Pashukanis theorized law as a social relation in the sense that Marx conceived of capital as a social relation (74). In his elaboration of chapter 2 of the first volume of Capital, Pashukanis focused on how the act of commodity exchange requires and conjures into existence abstract juridically equal parties, each endowed with property rights (109–20). The significance of doctrinal rules of contract law thus could not be understood separately from legal form, especially the universe of relations and subjectivities that such rules presupposed. The density of this universe is what corresponds to a theoretical space for law’s autonomy within a capitalist system—and what gives anthropologists an empirical entry point into approaching legal form as a distinctive phenomenon.

In Anglophone scholarship, Pashukanis’s work experienced a revival of interest among UK-based sociologists of law in the 1970s and 1980s (Balbus, 1977) and more recently among some international law scholars (Knox, 2016; Miéville, 2004). Insofar as Pashukanis billed his account as a substantive general theory of law and Marxism (or better yet, as a general theory of law under capitalism), its merits have been extensively debated: his notion of law is a teleological one defined narrowly around what he qualified as “bourgeois law” of an idealized capitalist society. Moreover, Pashukanis has been criticized for focusing on Marx’s account of commodity exchange to the near-complete neglect of production, the site of both exploitation and class formation. Social reproduction, and the questions it raises about the centrality of race and gender to understanding capitalism, are unsurprisingly also absent. Yet, as Ruth Fletcher (2013) has argued in her feminist reading of Pashukanis, the methodological utility of this approach to legal form endures in its attention to questions of subjectivity and in dialectical engagement with questions of content and form. Going beyond Pashukanis’s narrow focus on commodity exchange and contract law allows us to “recuperate legal form analysis as a relational activity
which investigates legal form’s representation of the social relations it captures” (Fletcher, 2013, 143). And insofar as legal form is like other social forms (prototypically, the value form), it both reifies and fetishizes and in so doing exists autonomously from other economic forces (Buckel, 2011, 163–65). In its commitment to legal form’s social effects, Pashukanis’s work also stands in contrast to the better-known strand of Marxist theorizing about law as ideology that runs through Gramscian notions of hegemony (to say nothing of Foucauldian approaches) and which was often cited in Anglophone anthropology of law from the 1980s onward.

Treating legal form as an ethnographic object allows for a dynamic analysis connecting doctrinal logics to material conditions. Legal form structures certain kinds of social interactions while at the same time obscuring other aspects of subordination. It encodes other abstractive social forms, such as patriarchy and racism (Lye, 2005): code here, in the expressive, directive sense as well as in the encrypting sense of mystifying logics of domination. Cheryl Harris’s (1993) classic work, which maps the shift from law inscribing whiteness as a property interest under formal segregation to obscuring it in post–civil rights movement ideologies of colorblindness, powerfully resonates with such an approach. Further theorizing these interrelationships across questions of form—legal, racial, gendered, and otherwise—is an important direction of inquiry in light of emergent conversations on law and racial capitalism (Gathii and Tzouvala, 2002; Gonzalez and Mutua, 2022; Harris, 2021; Park, 2022).

To demonstrate some of the merits of ethnographic lawyering methods, this article takes up conspiracy law and its role in early US court cases dealing with Al Qaeda. In Anglo-American legal traditions, the crime of conspiracy consists of an agreement between two or more persons to commit a crime. What makes conspiracy particularly striking is how easily the model of voluntarism can turn into a form of collective responsibility—a feature that made conspiracy a powerful weapon against labor organizing in the nineteenth-century United States (Tomlins, 1993). Under US law, conspirators can be held liable for other crimes committed by co-conspirators in furtherance of the conspiracy—even if unaware of such acts. This tension within the doctrine between conspiracy as the act of agreement and conspiracies as collective entities has long marked gang prosecutions and became especially glaring in the war on terror context. There, persons and events from unfamiliar contexts on the other side of the planet are often brought into relation with one another by parochial jurists wielding conspiracy law and encoding anti-Muslim animus.

Furthermore, tracing legal forms bearing the name of conspiracy reveals a ramifying web of even more doctrinal categories and artifacts—not unlike the vertiginous nature of conspiracy theorizing outside the law. Even “on the books,” conspiracy is more than merely a crime: it operates in the law of evidence and is a tort as well. Each of these doctrinal instantiations conjures another set of relationalities, thereby cautioning against attempts to theorize from law any singular notion of conspiracy detached from the operations of legal form.

### CHARGING CONSPIRACY

Before there was a global war on terror, there was United States of America v. Bin Laden. The first trial in this sprawling case arose from the near-simultaneous bombings of the US embassies in Kenya and Tanzania in August 1998, attacks that made their accused mastermind a household name. In spring 2001, four men were convicted of conspiracy and other counts while bin Laden, also charged, remained at large. In their indictments, prosecutors introduced the public to the specter of Al Qaeda as “an international terrorist group,” founded in the late 1980s, “dedicated to opposing non-Islamic governments with force and violence” with a “command and control structure” and “offices in various parts of the world.”

It was this narrative of a vertically integrated global Islamic terrorist organization bent on killing Americans everywhere that was ready at hand for amplification months later when the Twin Towers of the World Trade Center—less than a mile from the courthouse where the trial had been held—came crashing down.

In conjuring an organized entity that was foreign, threatening, and “Islamic,” the indictments were instruments of conspiracy theorizing that in some ways marked the birth of Al Qaeda as we know it. Prior to the embassy bombings, the Al Qaeda name was largely unknown. A June 1998 sealed indictment against bin Laden on a single count of conspiracy to attack US defense installations narrated Al Qaeda as an organization, providing the template for charges brought after the embassy bombings. The US government until this point tended to refer merely to the “bin Laden network.” Contemporaneous evidence that bin Laden’s loose entourage of retainers, clients, associates, and allies thought of themselves as members of a cohesive body is mixed. For his part, bin Laden had never mentioned Al Qaeda in his various speeches and interviews either. It was not until two years after the US government started making the Al Qaeda name world-famous that, in late 2000, the term emerged as a public self-designation (Miller, 2015, 7).

This is where ethnographic attention to legal form can be useful. Although it was certainly shaped with public perceptions in mind, this narrative about Al Qaeda described above was crafted first and foremost for the strategic context of a criminal proceeding that turned on charges of conspiracy. It expressed what practitioners call a theory of the case, or an account for how relevant law can be applied to a specific set of facts. One’s case theory should ideally be clear, straightforward, and resonant with the intended audience’s normative intuitions (or prejudices). A case theory is where doctrine meets practice and where folk theories of practitioners can give rise to new forms of narrative and action. On the defense side, there was no single case theory. Anthropologist Susan Hirsch ([2006] 2009, 82), who lost her husband in the Tanzania bombing and attended parts of the trial, observed that the defendants’ differing interests also led them to pursue strategies that did not align with each other, further undermining their persuasiveness.
As for doctrine, conspiracy usually requires an agreement between co-conspirators to commit a crime and at least one "overt act" taken to that end by some members of the conspiracy. The range of this case’s manifold overt acts is a reminder of conspiracy’s immense power of relationality: the wider the number and diversity of overt acts, the more opportunities prosecutors have to establish the existence of a conspiracy. Only about one-third of the section in the indictment detailing alleged overt acts was devoted to the embassy bombings. The rest pertained to Al Qaeda’s general operations, dating back to 1989 and taking place in a half-dozen countries. They included the provision of guest houses and training camps, military training, establishing a tannery and other businesses, calls for violence against the United States, and using false Egyptian passports. More inflammatory was the 1993 killing of 18 US troops in Somalia at the hands of unnamed “trainers trained by al Qaeda”— allegations never even presented to the jury due to their vagueness. Many of the overt acts on their own were not violations of US criminal law. But when combined with an alleged agreement to violate US law, they became cognizable as overt acts of conspiracy and gave rise to potentially global jurisdiction.

Here we can see how a case theory works in action: legal form (the crime of conspiracy) enables certain narrative content (Al Qaeda as organization). This in turn makes the machinations of legal form intelligible and persuasive to a specific audience (judge, jury, or both). Because the anti-Muslim animus (Al Qaeda as “Islamic”) is encoded here at the level of narrative rather than form, law’s surface of secular neutrality remains undisturbed. Case theorizing is what dialectically connects legal form to narrative content, thereby allowing Al Qaeda the organization and the crime of conspiracy to appear as synonyms. Such work is often contested, of course, as when defense attorneys complained that “the government has constantly during its argument blurred the lines between Al Qaeda and the conspiracy.”

But conspiracy does not merely relate objects and acts together; it also ramifies, thus ensuring tensions and gaps within the government’s case theory that mirror the unruliness of conspiracy theorizing in general. This messiness derives not from some kind of collective psychosis but from doctrinal logics in action. As a matter of legal form, conspiracy is still a criminal act. It is not a legal subject with rights and obligations. That is why there can never be a USA v. Al Qaeda criminal prosecution, but only cases against individuals associated with it (there are, of course, other legal contexts where entities are explicitly proscribed, such as terrorism lists). While we have seen how conspiracy can scale up through narrative reification, the crime’s paradigmatic focus on agreements between individuals can just as easily scale down by atomizing collectives. For instance, corporations do have legal personalities and can thus be charged with crimes—yet when faced with corporate malfeasance, federal prosecutors frequently frame the crimes as conspiracies between individual executives instead. Under the reign of capital and the “radical individualism” that inflects its legal notions of liability (Pashukanis, 2003, 178), corporate criminality is often reduced to personal misconduct. In some cases, the corporation (and its shareholders) is even posited as the true victim of managerial recklessness. Attacking the relationships between members of collectivities rather than collectivities themselves gives the crime of conspiracy a protean and flexible nature to match the most metastatic forms of conspiracy theorizing.

The disjuncture between narrative and form in the government’s case theory therefore meant it had to ultimately concede that Al Qaeda and the conspiracies it charged were not one and the same: a person could be in the conspiracy without being part of Al Qaeda and being part of Al Qaeda did not automatically equate to conspiracy (or any other crime, for that matter). This slippage did not seem to trouble prosecutors, as it allowed them to charge two of the defendants without having to prove that they were members of Al Qaeda. And, from the other side, counsel for one defendant, Mohammed Odeh, admitted that he was indeed a member of Al Qaeda but maintained that he opposed any conspiracy to kill American civilians worldwide. Thus, Odeh’s lawyer reasoned:

The government is kind of having it both ways. They are kind of mixing the word Al Qaeda with the conspiracy in Count 1. You got to be clear. The conspiracy in Count 1 is not an Al Qaeda conspiracy. The conspiracy in Count 1 is a conspiracy to kill Americans wherever you find them…. The government has to prove to you that he agreed to kill them anywhere and everywhere that he can find them.

Here, the defense highlighted the central ambiguity in the government’s case theory: the conspiracy is Al Qaeda and Al Qaeda is the conspiracy—except when they are not. In response, the defense sought to force a clear delineation: my client is in Al Qaeda but not in the conspiracy. Moreover, any presumed equation between Al Qaeda and conspiracy was further strained with more than one conspiracy charge at work. Note that the defense lawyer repeatedly referred to “the conspiracy in Count 1.” The government leveled four distinct but overlapping conspiracy charges: to murder US nationals, to kill government employees, to use bombs against US persons and government property, and to damage US government property with explosives. For prosecutors, filing more charges increased the probability of obtaining a conviction, even as each count’s grounding in different statutory provisions with their own definitions and elements multiplied potential tensions and schisms within the overarching theory of the case.

The jury returned guilty verdicts on all counts and the defendants were given life sentences. Defense arguments attacking the internal logic of the conspiracy charges were likely seen as mere hairsplitting and obfuscation when pitched against the government narrative of Al Qaeda as a global Islamic terrorist organization bent on killing Americans. And yet it was this same narrative that, as a formal matter, did not need to be proven at trial. As discussed above, if conspiracy stands in court as a doppélgänger for Al Qaeda, it is a mercurial one, an artifice and apparition of law driven by its own devices. Thus, it was not particularly important that the main part of the government’s case describing Al
Qaeda as an organization rested on somewhat shaky foundations: the testimony of two cooperating witnesses recalling events from a decade prior. Missing was any contemporaneous documentary evidence of a group calling itself Al Qaeda. It would not take long for this absence to be remedied.

EVIDENCING CONSPIRACY

Maintaining the lens of ethnographic lawyering, I move from the crime of conspiracy to conspiracy as a category in the law of evidence. Just as conspiracy pushes against criminal law’s construct of individualized responsibility, it also defies the ideal of producing judicial truth through the questioning of live witnesses that lies at the heart of the law of evidence. A key principle of the law of evidence is the rule against hearsay. Hearsay consists of statements made outside the courtroom that are offered as evidence of the truth of the matter asserted. One of the many ways around this rule is to use statements against someone if they were made by that party’s co-conspirator in furtherance of a conspiracy between them.12 This admissibility of co-conspirator statements took hold in English common law in the late eighteenth century during the panic over the possible spread of the French Revolution across the channel (Mueller, 1984, 325–29). In more recent years, it has often come up when discussing wiretap evidence, whose use expanded with the war on drugs and the concomitant rise of racialized mass incarceration. Here, again, conspiracy becomes a way of conceptualizing diverse social entities that do not enjoy recognized legal personhood, from revolutionary cadres to narcotics businesses. But this type of conspiracy is an altogether different doctrinal object than the crime of conspiracy, and indeed it can be invoked even in the absence of conspiracy charges. I call it evidentiary conspiracy, and I return to its operations below.

All of this was at work in another significant case concerning understandings of Al Qaeda. In March 2002, police in Bosnia-Herzegovina, acting at the behest of the United States, raided the local branch of an Islamic charity based in Illinois called Benevolence International Foundation (BIF). Among other things, a hard drive containing a folder labeled “Tareekh Osama” (Arabic for “History of Osama”) caught investigators’ interest. Inside were digital scans of news clippings and sundry documents, mostly dating from BIF’s previous operations in Pakistan during the 1980s and early 1990s. Within weeks, federal agents in suburban Chicago arrested the organization’s director, a Syrian-born US citizen named Enaam Arnaout, for conspiracy charges related to racketeering, providing material support to terrorists, and money laundering. Attorney General John Ashcroft boasted that Tareekh Osama was key to the case and “provide[d] for the first time documentary proof of the founding of al Qaeda.”13

As papers whose reliability could not be assessed through examining a live witness in court, the Tareekh Osama file was a classic example of material that should be evaluated as potential hearsay. To admit such material under the co-conspirator statements rule, judges must determine whether the statement was made by someone who was conspiring with the defendant. An evidentiary conspiracy, however, is much easier to prove than a conspiracy crime. First, while convicting someone of a conspiracy crime requires proof beyond a reasonable doubt, finding the existence of a conspiracy in order to admit a piece of evidence requires meeting only the lower preponderance of the evidence standard. Moreover, as with all preliminary questions, judges are not bound by most ordinary rules of evidence and may rely on the very material whose admissibility they are considering in order to make their determination. Finally—and most importantly—prosecutors routinely insist that an evidentiary conspiracy “includes any joint venture,” even a lawful one.34 This proposition is not settled law, but there is considerable precedent to support it.15 For those who understand how conspiracy theorizing outside the law often turns on elastic notions of what counts as evidence, this should not be altogether unfamiliar. Under this interpretation, an evidentiary conspiracy may not be a criminal conspiracy at all.

To show that the Tareekh Osama file was part of an evidentiary conspiracy, prosecutors filed a brief previewing the evidence they intended to introduce at trial. This practice follows the rule set down by a federal appellate court in United States v. Santiago, and hence, in Illinois, practitioners call these briefs "Santiago proffers.”16 The 101-page document purported to outline “a fifteen-year, international conspiracy to use ostensibly charitable organizations to support violence overseas on behalf of purportedly Islamic causes.”17 This evidentiary conspiracy effectively subsumed the three conspiracy crimes alleged in the indictment in conviction with racketeering, material support to terrorists, and money laundering. The evidentiary conspiracy’s temporal scope was significantly wider, originating in 1988 as opposed to the mid-1990s. It also wove together a far broader range of actors compared to the embassy bombings trial, linking Arnaout and BIF to Al Qaeda, to Hezb-e-Islami (one of the major Afghan factions in the jihad against the Soviet Union), and to state-backed militias in Sudan.

Finally, the Santiago proffer constructed an organizational origin story, quoting from the Tareekh Osama materials: “The series contains minutes of an August 11, 1988 meeting [in Pakistan] ... regarding the establishment of a new military group” consisting of a “general camp,” a “special camp,” and “Qaida,” or base.18 The gesture to interlinguistic glossing—qaida—is symptomatic of the government’s reliance on the Arabic language, here metonymic for Islam, to encode a sense of Muslim alterity. Prosecution filings in this case used Arabic terms even when perfectly adequate English alternatives were available (e.g., emir for leader or commander, majlis al-shura for consultative council). As for qāʿida, to Arabic speakers it is perhaps an incongruous name for a militant group, devoid of spiritual or historic significance and underwhelming when compared to the more typical formulations (think of Hizb Allah (party of God) or Hamas, an acronym for “Islamic Resistance Movement”). In general use, the noun qāʿida can also refer to a foundation, rule, or precept, a word that demarcates a field both semantically and pragmatically diverse (Miller, 2008). This has given rise to speculation that the eponymous qāʿida in question was a training camp, database of names, or a logistical resource hub for various endeavors. Notes from a later meeting gloss Al Qaeda as “an organized Islamic faction [faṣila munazzama islāmiyya] whose goal is to raise the word of God
and render victory to his religion,” perhaps the best evidence for the government’s theory, but one whose interpretation is far from self-evident.\(^{19}\) If conventional notions of interlinguistic translation imagine changing the form of a word while retaining its essential meaning, here an ideology of translation (Gal, 2015) performs the obverse: the original phoneme is retained (albeit in transliteration) but its indexical relationality has been rigidified in the service of the state’s theorization of conspiracy. An improper noun with many meanings becomes a proper noun denoting a specific organization.

Moreover, the government’s lexical fixation even caused it to insert Arabic terms into the document that were not originally there. It purported to reproduce the text of Al Qaeda’s “original bayat,” usually translated in these contexts as “loyalty oath,” but the term bay’a does not even appear in the original Arabic.\(^{20}\) Just as startling were the translations of Arabic terms that were used, such as for the phrase al-‘amal al-‘askarī al-jādīd. The translation produced by the government for its own internal use renders the text accurately as “new military work” (although “new military activity” would be more precise).\(^{21}\) Yet a handwritten note in the file substitutes “work” with “group,” which is the version that found its way into the Santiago proffer submitted in court to bolster its narrative of Al Qaeda as an organized entity (Figure 1).

The Santiago proffer, however, met a curious fate. In a brief written opinion, the judge ruled that the document was too vague to establish the existence of an evidentiary conspiracy. Without any specificity as to which of the three counts of criminal conspiracy the proffer sought to support, “it is speculative for the court to conclude whether a particular statement was in furtherance of a specific conspiracy or joint venture.”\(^{22}\) Therefore, the judge did not see the need to assess the reliability of the purported evidence. Although the reference to “conspiracy or joint venture” was a nod to the government’s contention that an evidentiary conspiracy need not be a criminal conspiracy, the demand to nevertheless tether the two forms of conspiracy together effectively sent prosecutors back to the drawing board. Yet, instead of seeking to file a new proffer that could satisfy the judge’s concerns, the government quickly accepted a deal in which all charges (including those pertaining to terrorism) save one were dropped. Nonetheless, this was still enough to put Arnaout in prison for over a decade.

As for the Santiago proffer and the Tareekh Osama file, they ultimately played no formal role in the resolution of the case, but they took on a life of their own, as though by greed possessed, muse for a new wave of conspiracy theorizing outside the courts. The bipartisan commission appointed by Congress to investigate 9/11 cited the Santiago proffer or Tareekh Osama six times, calling the cache “a wealth of information on al Qaeda’s evolution and history” (National Commission on Terrorist Attacks Upon the United States, 2004, 467). The materials have since been widely and often uncritically recycled in journalistic and expert accounts about Al Qaeda (Bergen, 2006, 76; Kohlmann, 2004; McChrystal, [2013] 2014, 402; Tankel, 2012, 39, 278).

**DISCOVERING CONSPIRACY**

A third area where the law invites—or incites—theorization of conspiracies is in tort and its relationship to civil procedure. The tort of conspiracy consists of an agreement to violate the rights of another party, whether through committing a crime or some other means. Until this point, this article
has considered conspiracy largely in criminal law, where the burden is on the state to introduce evidence that then forms the basis for theorizing conspiracy. In civil contexts, the judicial process itself extracts information from parties that can then feed into further conspiracy theorizing of all sorts outside the courtroom, including competing agendas within the state and even in relations between sovereigns.

Once again, ethnographic treatment of a particular legal form of conspiracy requires situating it in a constellation of other artifacts, all grounded in material concerns. While criminal charges require the state to possess some modicum of evidence before making an arrest, civil procedure inverts the relationship between accusation and investigation: complaints are held only to the standard of notice pleading, or alleging facts only with enough specificity to inform the other side as to the legal issues at stake in the case. Plaintiffs need not have any proof in hand before initiating a lawsuit. Here, seemingly minor technical aspects of civil procedure are intimately connected to struggles over capitalism. In situations such as manufacturing dangerous products or polluting the environment, corporations are often the only ones who have access to crucial information as to what they knew or should have known about their harmful activities. Requiring plaintiffs to have proof in hand before initiating lawsuits would make litigation in such cases nearly impossible. As the rise of industrial capitalism reshaped notions of causation, agency, and harm (Jain, 2006), the shift to notice pleading was one of the many legal reforms of the New Deal era that promised some limited ability to hold corporations accountable, thereby serving to rejuvenate American capitalism.

Thus, when making factual claims at the outset of a lawsuit, plaintiffs’ attorneys must merely certify that they “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery” (emphasis added). Once proceedings reach the discovery phase, parties can be compelled to submit to questions under oath and to turn over documents—unlike in criminal cases, where the Fifth Amendment prohibits self-incrimination. It is the threat of such disclosure, and the litigation costs for managing the process, that often weighs on defendants, as much as the final legal outcome of a case. And disclosures can further fuel the engines of conspiracy theorization, be it in the case theory of litigation or conspiracy theorizing writ large outside the courtroom.

In August 2002, a suit was filed on behalf of victims of the 9/11 attacks and their families seeking $15 trillion, more than the gross domestic product of the United States at the time, in damages. Over the subsequent decades, the case has grown into one of the longest and most complex civil actions in US history, pitting over six thousand plaintiffs against a staggering array of nearly two hundred defendants for, among a great many other things, conspiracy. Although Osama bin Laden and the Taliban were named as defendants, the real target—the ones most likely to have assets in the United States that could be seized to pay a judgment—were multiple businesses (especially banks) and wealthy individuals based in Saudi Arabia, as well as the Saudi and Sudanese states themselves. The suit and related civil actions were consolidated in New York and captioned under the heading of In Re Terrorist Attacks on September 11, 2001. At the forefront of the litigation was Motley Rice, a South Carolina–based firm that had risen to national prominence through working on mass torts cases, most notably the quarter-trillion-dollar 1998 Tobacco Master Settlement Agreement (Figure 2).

While the conspiracy crimes charged in USA v. Bin Laden focused on Al Qaeda members and the evidentiary conspiracy alleged in the Arnaout case implicated a broader network of charities and armed groups, the 2002 tort action depicted a conspiracy encompassing much of...
Saudi Arabia’s business elite. The connections sketched in the complaint, including capsule accounts of Al Qaeda and its alleged global front of charities and financial institutions, would readily be dismissed as mere conspiracy theorizing in many other contexts, to say nothing of the extravagant damages claimed. But this sue-first-and-ask-questions-later approach was a significant part of the litigation strategy. Here, notice pleading standards allowed lawyers to exploit ambient anti-Muslim sentiment to incite further public speculation about the defendants’ ties to terrorism. Harder proof could wait until the case reached the discovery stage, when plaintiffs gambled that they would be able to extract embarrassing material from defendants and hopefully pressure them into making a generous settlement.

From the moment its existence was publicly revealed in the Arnaout case, the Tareekh Osama file caught Motley Rice’s attention. One document in particular stood out: a handwritten list of 20 names, each with another name in parentheses beside it, which the government had dubbed “the golden chain.” This was purportedly a list of wealthy donors who financially supported bin Laden’s efforts against the Soviets in the 1980s, which Motley Rice seized on to implicate prominent Saudi capitalists.24 And going beyond the Tareekh Osama documents themselves, Motley Rice mobilized the government’s characterization of them. One motion directed at Adel Batterjee—the financial patron behind BIF, and also named in the 9/11 lawsuit—quoted entire paragraphs of the Santiago proffer in the Arnaout case.25 None of this was particularly successful: the judge noted that the proffer had been rejected and called the golden chain “a document with serious foundational flaws” that said nothing about who wrote it, when it was written, or for what purpose.26 Motley Rice did not give up, even taking the unusual step of making further filings, hoping to get the judge to reconsider the document’s value, without success.27

In the meantime, the 9/11 lawsuit continued to grind its way through the courts, thanks to the fraught dynamics of the relationship between the United States and Saudi Arabia. In 2016, after languishing in procedural limbo for over a decade, new life was breathed into the suit by the release of a classified portion of a congressional inquiry into the 9/11 attacks. These “missing 28 pages” had excited great interest and speculation over the years. When finally revealed (albeit with some redactions), the report summarized internal FBI and CIA documents concerning several Saudi consular employees in the United States who were alleged to have had contacts with some of the 9/11 hijackers.28 Although vague and tentatively worded, the document constituted the strongest statement yet from a US government entity linking Saudi Arabia to the attacks. While not a smoking gun, it gave plaintiffs hope of at least a Chekhovian one.

The case received a major boost on the legislative front in 2016 as well. Over the preceding years, the counts against the Saudi state and its agencies had founder due to the doctrine that foreign sovereigns are ordinarily immune from suit in US courts. Congress stepped in to resuscitate the lawsuit’s prospects by passing a law removing sovereign immunity for all acts of international terrorism against US people or persons.29 The Saudis were enraged, and the presidential administration of Barack Obama was also alarmed that the move would encourage other states to allow litigation against the United States in their own courts. But the pressure on legislators from both parties to lend support to the families of 9/11 victims was overwhelming. Congress passed the measure by a voice vote and promptly overrode Obama’s veto, the only time this occurred during his presidency.

The drama accurately reflected the nature of the US-Saudi relationship, which itself is often described in conspiratorial terms: vociferous public posturing against each other coexisting with a firm bedrock of strategic partnership, including in the recent war on Yemen. It is also a reminder of law’s importance in regulating and containing conflicts between dominant factions (Poulantzas, [1978] 2014, 91), even at the international level. Saudi Arabia did not follow through on its (theatrical) threat to withdraw assets from the United States, while one cannot help but suspect that members of Congress felt safer letting the lawsuit continue in the belief that it was unlikely to succeed on the merits in the end. But continue it has. In March 2018, the suit cleared a major hurdle when the judge rejected Saudi Arabia’s immunity arguments and allowed the case to proceed to discovery, mostly to verify the allegations raised in the missing 28 pages about two men named therein as alleged Saudi agents.30 Over the summer of 2021, current and former Saudi diplomats were questioned under oath as the case ambles toward a trial date. Meanwhile, the notion that two allies bound together by billions of dollars in oil, arms, and a shared commitment to counterrevolution would remain at loggerheads over whether one sponsored a mass-casualty attack on the other would seem to epitomize the absurdity that often weighs down conspiracy theorizing. But, then again, stranger things have happened. After all, what is a little judicial shakedown between co-conspirators?

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ENDNOTES

1Because this article addresses US legal cases, it follows the (nonscholarly) transliterations for Arabic terms most commonly used therein. Scholarly transliterations will be used only when referring to original Arabic documents or when discussing issues of translation.
The clarification that ethnographic lawyering starts with a reading practice was prompted by an anonymous reviewer who expressed skepticism as to whether this argument is anthropological in any meaningful sense and questioned its relevance “beyond the confines of court documents.” The point here is to take “the confines of court documents” as a worthy point of departure in its own right for anthropological study.

Italian law has used legislation to define the specific negative sociality of the mafia as a kind of hierarchical paramilitary organization, obscuring other forms of relationality at work, especially logics of patronage (Ben-Yehoyada, 2018).

The government cast Odeh as a “technical advisor” to the bombers, as the evidence linking him to the acts was circumstantial. Id., at 5227:12–13 (May 1, 2001).

This rule was adopted by the US Supreme Court in Pinkerton v. United States, 328 U.S. 650 (1946), and contrasts with secondary forms of liability, such as aiding and abetting, which tend to require a more direct link to specific criminal acts.

The Supreme Court declined to weigh in on this issue as recently as 2018. See 9/11 Case, January 2005 Order, at 41.


Theoscot, at 18–19.

J. M. Berger (2012), an investigative journalist, published the government’s translation of this document.

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REFERENCES CITED


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